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No. 82-298

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE ANACONDA COMPANY, a Corporation, on its own behalf and as successor by merger to ANACONDA AMERICAN BRASS COMPANY, ANACONDA WIRE AND CABLE COMPANY, ANACONDA ALUMINUM COMPANY, and ANACONDA ELECTRONICS COMPANY,

Appellant,

v.

THE FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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October 8, 1982

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I.

Appellant The Anaconda Company ("Anaconda") respectfully submits its brief in opposition to the undated motion of appellee The Franchise Tax Board of the State of California ("Franchise Tax Board") to dismiss or affirm.

Anaconda's position was fully set forth in its jurisdictional statement herein dated August 20, 1982. It was shown that this case involves the same issues of state income taxation as are

presently before the Court in *Container Corporation of America v. Franchise Tax Board,* 117 Cal.App.3d 988, 173 Cal.Rptr. 121 (1981), *prob. jur. noted,* ____ U.S. ____, 102 S.Ct. 2034 (1982) and *Chicago, Bridge & Iron Company v. Caterpillar Tractor Co.,* 84 Ill.2d 102, 417 N.E.2d 1343, *prob. jur. noted,* 454 U.S. 1029, 102 S.Ct. 564 (1981).

The Franchise Tax Board motion does not even cite the *Container* and *Chicago Bridge & Iron* cases. Indeed it tacitly concedes that the Anaconda case raises the very same issues as these cases.

The issues in this case are relatively simple and are clearly defined and thoroughly identified in the jurisdictional statement of Anaconda. Nevertheless, the motion of The Franchise Tax Board seeks to confuse the issues by making several erroneous statements that require refutation in order that the Court may not be misled. For convenience, the statements will be dealt with in the same order as they appear in the motion.

1. The Franchise Tax Board states on page 3 and again on page 6 that the California Court of Appeal made various "findings" adverse to Anaconda. This is not correct. This case was decided after a trial covering 8 days and over 700 pages of transcript. The stipulation of fact covered technical and financial matters. The trial court then made detailed findings of fact, upholding Anaconda's position. The California Court of Appeal did not hold any evidentiary hearing, nor did its opinion purport to make independent findings of fact. The Court of Appeal held that as a matter of law and on authority of its decision in *Container Corporation of America v. Franchise Tax Board,* Anaconda's Latin American income was subject to California taxation. (Jurisdictional Statement, Appendix A at A-14 & A-15.)

The facts of this case are set forth fully and fairly on pages 2 through 7 of Anaconda's jurisdictional statement. The Court of Appeal concluded that legal conclusions contrary to Anaconda's position could be drawn from those facts. But the Court of Appeal did not purport to make new findings of fact and the argument that it did so is erroneous and misleading.

2. The Franchise Tax Board states on page 3 of its motion that "California clearly has nexus to tax Anaconda on its entire worldwide operations" and then lists some seventeen activities.* However, the Board significantly does not mention that each and every one of these activities took place outside of the State of California. No evidence is cited by the Board of any nexus between the Latin American Companies and California. There is no nexus.

3. The statement by the Franchise Tax Board on page 5 of the motion to the effect that double taxation was not demonstrated in this case is clearly wrong and misleading. The parties stipulated to the presence of double taxation here! (Stipulation, section 5(i)(a), page 33, Clerk's Transcript on Appeal at 611.)

Further, the Franchise Tax Board tries to obscure the relevance of *Japan Line Ltd. v. County of Los Angeles* (441 (U.S. 434 (1979)) to the issue of multiple taxation by attempting to make some state versus federal tax distinction. *Japan Line*, like the present case, however, involved a tax at the state level. Simply restated, what Anaconda complains of here is the taxation by California of income already fully taxed in the country where it was earned by its overseas subsidiaries even though the overseas subsidiaries did not have any contact with, nor do any business in, California. In such a situation, *i.e.*, where foreign commerce is involved, *Japan Line* requires "a more extensive constitutional inquiry." *Id.* at 446. While *Japan Line* involved an ad valorem property tax, the rule set forth by the Court therein to test the constitutionality of a state tax is triggered by foreign commerce and not by the presence of a property tax on the instruments of foreign commerce. If that inquiry reveals that the tax in question creates a substantial risk of international multiple taxation or if the tax prevents the federal government from speaking with one voice, it is unconstitutional under the Commerce Clause.

In this case there is not only the risk of international multiple taxation, there is international multiple taxation in fact. Furthermore, while the United States and most foreign countries employ an arm's length method of allocating income

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* These arguments are repeated on pages 8 through 12 of the motion.

between corporations, California employs a combined reporting method which necessarily impairs federal uniformity in the taxation of income earned by a multinational group of corporations such as the Anaconda group. Therefore, under either prong of the *Japan Line* test, the Court of Appeal's decision in this case should be reversed.

4. The Board, in an apparent effort to retry its case in this Court, states that Chile and Mexico did not extensively regulate and control Anaconda's operations in Latin America and cites several trial exhibits. (Motion, pages 6 and 7.) This issue was the subject of days of trial testimony. The exhibits cited by the Board were considered by the trial court, and the trial court also considered the fact that while the statements were made in reliance on assurances of host country officials, in fact tight controls were imposed. The trial court resolved the disputed issue of fact in favor of Anaconda.

5. The Board states in a footnote on page 8 of its motion that Anaconda failed to include any findings on the constitutional issues. The implication is that Anaconda did not pursue the issue in the trial court. Nothing could be further from the facts. The findings were by the Superior Court, not Anaconda. The constitutional issues were raised by Anaconda in the pleadings and Anaconda argued the issues to the trial court, on the basis of both live testimony and the stipulation. (Plaintiff's Trial Memorandum at pages 157 through 176, Clerk's Transcript on Appeal at 106 M BB through 106 F BBB.) The trial court ruled that in view of its decision in favor of Anaconda on the factual issues, it need not decide the constitutional issues. (Jurisdictional Statement, Appendix A at A-61.). The Court of Appeal, rather than remand the case for a further trial on the issues, ruled as a matter of law on authority of its recent *Container Corporation* decision that the constitutional issue would be resolved by it against Anaconda without further hearings in the trial court. (Jurisdictional Statement, Appendix A at A-20.)

Accordingly, Anaconda not only raised the issues but has pursued them at every opportunity.

6. The Franchise Tax Board erroneously asserts on page 12 that this Court's recent decisions in *ASARCO Inc. v. Idaho State Tax Commission*, ____ U.S. ____, 102 S.Ct. 3103 (1982) and *F. W. Woolworth Co. v. Tax. and Rev. Dept. of New Mexico*, ____ U.S. ____, 102 S.Ct. 3128 (1982) support its position. These cases however clearly indicate that where foreign subsidiaries do not operate as a unitary business, the due process clause prohibits California, or any other state for that matter, from taxing income earned outside its borders. Here the Franchise Tax Board has failed to demonstrate any nexus whatsoever between California and the income earned by the Anaconda subsidiaries operating in Chile and in Mexico. Futhermore, the occasional oversight which the Anaconda parent company in New York gave to these subsidiaries operating outside the United States does not provide California with the necessary nexus which due process requires. In *Woolworth* this Court, by implication, found that such occasional oversight by a parent to its investment in a subsidiary with respect to capital structure, major debt, and dividends are insufficient to establish "integration of the business activities or centralization of the management" between the parent and its foreign subsidiaries. 102 S.Ct. at 3138.

California's taxation therefore, of income earned outside its borders having no connection whatsoever with activities in California and for which it provided no benefits to the taxpayer, must fail under the standards of due process as further elaborated in *ASARCO* and *Woolworth*.

Other arguments made by the Board in its motion are fully answered in Anaconda's jurisdictional statement and we will not burden the Court with a repetition thereof.

II.

CONCLUSION

The motion to dismiss or affirm should be denied and probable jurisdictional should be noted.

Dated: October 8, 1982

Respectfully submitted,

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